THE HORSE AND ASS YOKED: LEGAL PRINCIPLES TO AID THE WEAK IN A WORLD OF UNEQUALS

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PROTOCOLS

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1 My sentiments are the same as Elihu's who said of the only true God, Jehovah: "[He] has not shown partiality to princes and has not given more consideration to the noble one than to the lowly one, for all of them are the work of his hands:" Job 34:19. Without the benevolence of this impartial God, how would I have come this far in life?

2 I wish to thank God for giving me the best pair of parents. My late dad, Matthias, taught me basic Bible truth, the value of self-discipline and deep respect for other's properties. I look forward to seeing him in the resurrection to let him know that I was able to come this far in life due to the foundation he laid in me. It has pleased the true God to keep my beloved mum, Ethel, alive till date; she is now 83. She instilled in me the value of industry. From her I learnt that almost all things are achievable with diligence, hard work and more hard work.

3 My siblings have been simply wonderful. Nonyelum has been more than an eldest sister: She is an able adviser and exemplar; my elder brother, Onyeabor always supported dad even when we felt dad's discipline was harsh; Ogochukwu's loyalty to Jehovah and His organization saved my life; Eliza's stoic attitude to life urges me on; Mike's encouragement gives me the needed push.

4 Felix Banye as well as Messrs Alex, Azu, Uche and Nnanye Aligbe provided financial and emotional support when I was in school especially when my strength was on the wane.

5 At 12 I was sent to Lagos to serve Mr Michael Mordi and his wife, Pauline. Michael's elder brother, Paul, facilitated this. I thank the three of them. Uncle Mike and aunty Pauline treated me kindly as a son of the household, accommodated my stupidity, and provided me needed discipline up to the age of 16. Aunty Pauline is large-hearted. At some time we were up to 8 in one room. Not many women would trade their privacy for a complete stranger that I was. I express my profoundest gratitude to three of you. May Jehovah reward you with endless life on Paradise earth!

6 My maternal uncle, Augustine Ogbechie, took me in at 16 and cared for my needs for a full year. This was a big sacrifice because he had barely enough to rent a small room and he worked as a junior staff. Even so, when my maternal granddad, Akaeze Ogbechie, insisted that I should not leave Lagos for the village, my uncle obeyed his dad. Before I left my uncle, he ensured I obtained a job first at Domino Stores, Yaba, and later at Kailash Textile Industry at Oyingbo. Throughout, he permitted me to keep my earnings while he met my basic needs. Uncle Augustine, I thank you profusely.

7 My deep gratitude goes to Mr Akin Lucas, now a secondary school principal in Abeokuta. He, along with Mr Sam Uyeye, facilitated my obtaining an opportunity to attend a job interview at University of Lagos (Unilag) as a steward. There was no advert for a typist but at the interview, I convinced the panel that I could type deftly and I had the requisite Pitman and Royal Society of Arts certificates. I was immediately tested on a typewriter. I got employed

as a typist, not a steward. I thank the broadminded administrators who gave me the opportunity to prove myself.

8 I owe Titi Ademola Banjoko a heap of thanks for introducing me to Chief Okudolo's Exam Success Correspondence College, Palmgrove, Lagos. I met him employed as a typist in Faculty of Business Administration, Unilag. Titi became my reading mate and bosom friend for about a decade. We both qualified as lawyers in 1985.

9 I would be remiss to omit the vice principal of Baptist Academic, Lagos (I can't recall his name now) who gratuitously offered me opportunity to write HSC at the school. Before then I had obtained DE and DEE at two earlier GCE A/L exams. Those grades could not earn me admission to study either Law or Mass Communication. At the HSC exam I obtained ABEE and the door to Unilag was wide opened to admit me not as a steward or typist but as a Law student.

10 Prof Adalemo (former DVC Unilag) was helpful to me. By the time I got to my final year in Unilag, my savings were badly depleted and I could scarcely afford 20k for a meal ticket. Prof Adalemo entrusted his office key to me to enable me use the typewriter in his office. I typed my colleagues' projects for a fee at night and studied during the day; that way I survived.

11 My lecturers in Unilag were commendably dutiful and diligent. Among them are Professors Jelili Omotola SAN (deceased), Emmanuel Akanki, Isaac Agbede, Amos Utuama SAN (now AG Delta), Yemi Osibajo SAN (now AG Lagos), Osarhiemen Osunbor (Senator and Edo State gubernatorial aspirant), Chioma Agomo (Dean of Law Unilag), Awa Kalu (former AG Abia). Late Olaide Adigun stands out among them all. At the end of my sophomore, he looked beyond my grades and employed me as a research assistant. The challenging assignments he entrusted me with were the foundations I needed to know where to find the law. May Jehovah remember him in the resurrection of the righteous and the unrighteous!

12 I am thankful to Professors Osita Eze and Oye Cukwura who employed me as a corps member at Imo (now Abia) State University. They entrusted me with a class, monitored my progress and ensured that I was employed as an Assistant Lecturer at the end of my NYSC even though that privilege was then reserved for indigenes of the State.

13 I cannot thank Professor Andrew Onokerhoraye enough. *Mi guo.* He was DVC when I was employed. The VC then, Professor Grace Alele-Williams, had delegated to him the duty of receiving new lecturers. I told him of my desire to have my wife employed since she was then in Lagos. He promised he would see to it; and he did when he became VC. More than that, it was during his tenure I first became Acting Head of Department; and I got a research grant that enabled me obtain materials for my book on Law of Banking.

14 Professor Nkeonye Otakpor has been very paternal to me during my stay here. *Diokpa, imeke.* So has Professor Patrick Igbinovia who was a member of the interview panel both when I was employed and when I was interviewed for a full chair. I thank you both.

15 My colleagues in the Faculty have been supportive in all my endeavors. Professors Ehi Oshio (present Dean) and Lawrence Atsegbua; Dr Solo Ukhuegbe, Messrs Gerry Okogeri, Richard Idubor, Bright Bazuaye, Vincent Akpotaire, Nelson Ojukwu-Ogba, Nat Inegbedion; Mrs Obehi Odiase-Alegimenlen, Nkolika Aniekwu, and Victoria Kalu and all others who have made the Law Faculty congenial for research and teaching.

16 My students upon whom I have practiced deserve special mention. Since I do not engage in litigation practice, through them I get to know the challenges people face and as I seek answers to them, my knowledge of the law is enriched. As well, they bring to my attention shortcomings in my books. This is appreciated in an alliterate society that has little reading habit to commend it.

17 My thanks are due the VC, Professor Emmanuel Nwanze. He sent my publications for assessment when he assumed office as VC. I thank him too for entrusting the deanship of Faculty of Law to me 2004-2006. Apparently I did not disappoint thus he appointed me

Chairman of Students Certificate Screening Committee. Presiding over a multi-ethnic community of educated and intelligent persons none of whom can be led by the nose is not an easy task. I hope that all will learn to look for the good in him and play down on his foibles, if any.

18 My heart throb, Uduak, deserves all the affectionate words you know in all languages. Here are some of the words I used for her in my books: `an intimate companion, close confidant and a sweet wife,' `my stay in over a decade of married life,' `provides the blessing of enduring love, care and support,' `without her equable personality and sensibleness this and a million less one other efforts would never have come to fruition,' `she exhibits amazing continence.' In words of one syllable, she is the best wife in the world.

PREFATORY

I would want to state from the outset that the glory that comes from this inaugural lecture should be shared with my wife. This is not one of those flattering comments some make about their wife in public to give the world the impression that the love between them blossoms whereas the home is in chaos. Sometime in 1996 my wife urged me to acquire a set of tabletop personal computer to aid me in word processing. I was hesitant as those were the harsh years of meager wages, and in any case I was not computer literate. But, much as Abraham listened to his wife on God's direction, I listened to my wife. My wife is computer literate and she taught me the rudiments. I believe I learnt fast because the computer was in the bedroom and she was fond of putting her warm breasts on my shoulders as she taught me. The word processing facilities in a computer are a *sine qua non* for legal research. Udee, a zillion thanks.

It has always been my goal to deliver my inaugural lecture within a year after the University Governing Council's announcement of my elevation; it warms my heart that I am able to attain this. This inaugural lecture is the first in the Law Faculty, University of Benin, nay, in any other Law Faculty in the south-south region. It is the third by a professor of property law. The first was in 1988 by Professor Jelili Omotola of University of Lagos entitled *Law and Land Rights – Whither Nigeria?* The second was in 1996 by Professor Oretuyi of Obafemi Awolowo University. He lectured under the theme *Title to Land in Nigeria: Past and Present.*

Although I am a professor of property law, as this lecture will show, my research goes well beyond land law which is my first love. This is borne from my conviction that there are two types of professors of law. One is represented by a Dean of Law who, after late Chief F R A Williams, SAN had delivered an insightful lecture on the Land Use Act, rose to say he was not a professor of land law and so he had no comment to make. The audience booed him, I would say, deservedly. These professors claim to know everything about their narrow area of research. Others, on the other hand, know a bit about almost every aspect of law. In this class are Professors Otto Kahn-Freund, Glanville Williams, E Nwogugu, C O Okonkwo SAN, S Adesanya SAN, Emmanuel Akanki, Itse Sagay SAN, and David Ijalaye SAN. The verity is that the law is so intertwined that it is foolhardy for anyone to say he is at home with property law where his grasp of commercial law is weak; that he specializes in constitutional law where his knowledge of tort is wobbly; that he professes in commercial law where he knows next to nothing about private international law; that he is a guru in jurisprudence where he totters in public international law or comparative law.

INTRODUCTORY

General

Now we come to the title of my lecture, "The Horse and Ass Yoked: Legal Principles to Aid the Weak in a World of Unequals." The horse is a strong, almost abrasive animal. This is what the Holy Bible says about it:

> Can you give to the horse mightiness? Can you clothe its neck with a rustling mane? Can you cause it to leap like a locust? The dignity of its snorting is frightful. It paws in the low plain and exults in power; it goes forth to meet armor. It laughs at dread, and is not terrified; nor does it turn

> back on account of a sword. Against it a quiver rattles, the blade of a spear and a javelin. With pounding and excitement it swallows up the earth, and it does not believe that it is the sound of a horn. As soon as the horn blows it says Aha! And from far off it smells the battle, the uproar of chiefs and the war cry: Job 39:19-25. (All quotes from the Holy Bible is from New World Translation which Jehovah's Witnesses publish and distribute)

An ass, on the other hand, is a meek animal, weak in comparison with a horse. Jesus Christ, the greatest man who ever lived, rode on an ass triumphantly into Jerusalem in 33 CE. Prophetically, Zechariah said of this event:

> Your king himself comes to you. He is righteous, yes, saved; *humble*, and riding upon an ass, even upon a full-grown animal the son of a she-ass: Zechariah 9:9.

So metaphorically, in this lecture, the horse is used to represent strong and mighty individuals and organizations in the society who use their position to oppress and suppress the weak, needy, vulnerable and helpless, metaphorically asses. Interestingly, the Supreme Lawgiver, Jehovah, commanded the Israelites not to yoke a bull and an ass together while plowing the field (Deuteronomy 22:10). The reason is obvious. The bull with its superior strength would work the ass to death.

Today, however, we cannot escape the reality of an unequal world. In schools, teachers and school administrators are the horse, the pupils and students are the ass. A patient is the ass while the physician and other paramedics are the horse. In the matrimonial home, the husband is almost always the horse, the wife the ass. In an employment situation, the employer is the horse, the employee the ass. A bank customer is the ass and the bank is the horse. In a mortgage relationship, the lender (mortgagee) is the horse, and the borrower (mortgagor) is the ass. Where a tenancy is created, the landlord is the horse, the tenant the ass. Nor is the horse/ass metaphor limited to individuals. It can be extended to large organizations. My research shows that large religious organizations struggle to muzzle smaller religious groups, branding them as cults, denying them the rights and privileges the law accords all. May be owing to my background, my research interest has focused on how legal principles can be fashioned to assist the weak, how the law can be used as an instrument to rescue the lowly from the mighty, oppressive arms of the uncaring and unkind.

How Laws are Made

The lay imagines that the law is made solely by parliament. But that is very far from the truth in English-speaking legal systems. Much of the English law which is applied in about a quarter of planet earth is judge-made. These laws were made by judges who were Christians. The strong Christian religious belief immanent in England seeped into the formulation of almost all aspects of the law. Lord Devlin once observed that "English law did not originate as a set of club rules" unscathed by religious beliefs.

Sometimes judges expressly refer to the Holy Bible, some other times they allude to it. In *R v Dudley and Stephens* (1884) 14 QBD 273 two crew members who were shipwrecked in the ocean ate the cabin boy when they were at the verge of dying of starvation. When they berthed in England, they were found guilty of murder. Lord Coleridge CJ said that as Englishmen, the seamen should have sacrificed themselves to ensure that the little boy survived just as our Lord, Jesus Christ, sacrificed himself for the sins of many. (Remarkably, Queen Victoria granted them pardon) In *Donoghue v Stevenson* [1932] AC 562 the English House of Lords (through Lord Atkin) grounded the modern law on negligence on Jesus' parable of the Good Samaritan. The principle that only a person who is a party to a contract may take benefit under it or sue on it, the public law principle of *locus standi,* as well as the private and commercial law principle that the defence of *jus tertii* would not avail a party to an action is founded on the scriptural injunction that says no one should be a busybody in other's affairs: 1 Peter 4:15.

The English common law was originally customs of various groups in the society. When dispute arose and recourse was had to the courts, judges fell back on scriptural principles, commercial practices, economic realities of the day or scientific discoveries. Where there are conflicting decisions or where a judgment appears unjust, parliament responded by enacting a holistic statute to regulate the situation. But

even here, it is what the judge says parliament has enacted that turns out to be the law. As Lord Denning said in words of one syllable:

> In theory the judges do not make law, they merely expound it. But as no one knows what the law is until the judges expound it, it follows that they make it.

No rational person who comes in contact with the law can dispute the verity that judges make law. Some seven decades ago, Davis, an American writer stated:

> It is conventional wisdom today to observe that judges not only are charged to find what the law is, but must regularly make new law when deciding upon the constitutional validity of a statute, interpreting a statute, or extending or restricting a common law rule. The very nature of the judicial process necessitates that judges be guided, as legislators are, by considerations of expediency and public policy. They must, in the nature of things, act either upon knowledge already possessed or upon assumptions, or upon investigation of the pertinent general facts, social, economic, political, or scientific.

Let us illustrate this assertion with a few examples. In 1677 the Statute of Frauds was enacted. It provides that transfer of land should be evidenced in writing. In effect, if A transfers land to B without reducing it into writing, B acquires no interest; the transfer is unenforceable. No sooner had this law been passed than judges formulated the principle of part performance. Simply, this principle is that if A transfers land to B orally and B pays him and is put in possession of the land by A, the court would conclude that it would be unjust for A to plead that the transfer is ineffectual merely because it was not reduced into writing. In 1845 the Real Property Act was enacted. In essence it provides that if A wishes to transfer an interest in land for a period extending more than three years, the document of transfer must be a deed (a document that is signed and sealed). Less than 40 years later, the English Court of Appeal formulated the rule in *Walsh v Lonsdale* (1882) 21 Ch D 9. The principle is that if the transfer is on a document that is not sealed, any of the parties may apply to court for an order to compel the opposing party to reduce the transaction into a deed. And I am sure you will find this interesting: The US Constitution came into force in 1776. One of its key features is equality for every person, but it was not until 1954 that the US Supreme Court agreed that a black American is a person with the right to equal access to education as his white counterpart. Prior to its decision in *Brown v Board of Education* 347 US 483 (1954), US courts had formulated the doctrine of `separate but equal' in American public schools.

Local examples should be added. The Land Use Act 1978 empowers a State Governor to revoke a right of occupancy for overriding public interest. In *Osho v Foreign Finance Corporation* [1991] 4 NWLR (pt 184) 157 the Supreme Court (per Justice Obaseki) held that this power may only be exercised after the Governor has given the holder of the right of occupancy opportunity to be heard: he should be told why his land is being taken away, what the overriding public interest is, the new land he is to be given, or the amount of compensation he would be paid. Another example: the Public Lands Acquisition Laws empower a Governor to acquire a person's land for public purpose. The Laws expressly provide that as soon as the acquisition is complete, the owner's interest in the land ceases; it becomes government land. But there are cases where government acquires land and leaves it unutilized for many decades. The clear statutory provisions notwithstanding, Nigerian judges have commendably held that a former owner can take out a writ to obtain declaration of title to the land either where the government agency attempts to use the land for another purpose, or abandons it: *Akanni v Olubadan-in-Council* [1957-58] WNLR 98; *Olatunji v Military Governor, Oyo State* [1995] 5 NWLR (pt 397) 586, 602. I have gone further to assert that an aggrieved landowner need not go to court. He should simply resume possession and if government wishes to assert title and possession, it should take out a writ. Self-remedy is lawful under such circumstance. Indeed, no matter how cast-iron a statute may be, an astute judge can get round it and construe it to suit his disposition.

Hierarchy of Laws

For those who are familiar with the Bible, it would not be a surprise to learn that the law is in a hierarchy. The Pharisees once asked Jesus which commandment was the greatest. Jesus did not dismiss their

question as of no moment; indeed, he gave them more than they requested. He told them that our love of the true God, Jehovah, with our whole heart, soul, mind and strength was the greatest. This is followed by our love of our neighbour as ourselves: Matthew 22:36-39. Shortly after Jesus ascended to heaven and his loyal disciples were charged before the 71-man Sanhedrin (the Jewish Supreme Court), the issue of hierarchy of laws again arose. Jesus had commanded his disciples to preach the magnificent things of God to Jews, Samaritans and non-Jews. In opposition, the Jewish Supreme Court ordered the disciples to stop declaring Jesus' resurrection. The apostles were in no doubt who had the higher legal authority on matters of religion. First, Peter and John put the matter in the court of the religious opposers of the day in these words: "Whether it is righteous in the sight of God to listen to you rather than to God, judge for yourselves. But as for us, we cannot stop speaking about the things we have seen and heard:" Acts 4:19, 20. And later when the disciples were arrested for their relentless proselytizing, they unanimously and fearlessly declared: "We must obey God as ruler rather than men:" Acts 5:29.

Today, an understanding of the hierarchy of laws remains topical and imperative. In a constitutional democracy, the Constitution is at the apex; then comes a statute enacted by the National Assembly so long as the statute is within the limits of powers conferred by the Constitution; next follows a Law enacted by a State House of Assembly; then comes a Byelaw made by local government councils. The common law and equitable principles the legal system received from England come next. At the bottom is conventional customs or morals which have no legal status until judges clothe them with validity. Even within the Constitution, some provisions are higher than others. For instance, the fundamental rights are superior to the directive principles of state policy which are not justiciable.

Due to some of the issues to be discussed below, I deem it apropos to mention here that sometimes man's laws conflict with God's. Again, this finds roots in the Bible. In the days prior to Jesus' ministry on earth, three Jewish exiles faced the question of whose law was superior: Man's or God's. Babylonian King Nebuchadnezzar ordered all his officials to bow down to an image he erected in Dura. Shedrack, Meshach and Abednego objected on the ground that the King's order was contrary to God's law as set out in the first and second of the Ten Commandments, namely you must not have any other god against my face, and you must not bow down to any image. When Jesus was on earth, religious leaders attempted to get him involved in a dispute over political matters. They deviously sought to know the legality of paying taxes. Jesus deftly answered by stating that Caesar's things should be given to him and God's things to God. God's things include worship, obedience to all his laws under all and any circumstance. And Jehovah's Witnesses believe that they retain the authority to decide what are God's and what things are Caesar's. In sum, God's laws are superior to man's and Jehovah's Witnesses are willing to face any adversity, even paying the supreme sacrifice rather than turn their back at God's law in preference to man's. Please permit me, Mr Vice Chancellor, to say in one word that Jehovah's Witnesses is a 6.7 million-strong Christian religious group with members in some 235 countries and islands. In Nigeria, they number some 290,000. Their magazines, *The Watchtower* and *Awake!* along with other Bible-based literature, are translated into over 430 languages and are widely distributed by itinerant volunteer preachers.

And the belief of Jehovah's Witnesses with reference to the superiority of God's law over human law is not novel. The well known English jurist Sir William Blackstone said:

> It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original. Upon these two foundations, the law of nature and the law of revelation [found only in the Holy Scriptures], depend all human laws, that is to say, no human laws should be suffered [permitted] to contradict these: *Chadman's Cyclopedia of Law,* 1912, vol I, pp 89, 91 quoted in *Insight on the Scriptures,* 1988, vol II, p 224. Published by Jehovah's Witnesses.

The universality of the superiority of God's law over man's is neither limited to Western jurisprudence nor to those who recognize the Holy Bible as the foundational source of law. The author of

the earliest law code is Hammurabi, an ancient Babylonian lawgiver. He prefaced his 300-clause law code with these words:

> At that time [they] named me to promote the welfare of the people, me, Hammurabi, *the devout, god-fearing prince*, to cause justice to prevail in the land, to destroy the wicked and the evil, that the strong might not oppress the weak.

Value of Comparative Law in Legal Research

The last issue in this introductory part is to highlight the place of comparative law in legal research. Comparative law simply means that in searching for legal principles to solve a problem, it is behooving on a researcher to look beyond one legal or judicial system in order to proffer a well-rounded out solution. Those who delight in comparative law know that man's needs are basically the same wherever he lives. Everyone needs a government that is first able to control itself before seeking to govern others; also the necessities of food, shelter, clothing, a secure source of income, a place to save a little extra because of the uncertainties of life, peace and tranquility, a secure family life, among others. What is more, because man was created in God's image, those virtues as justice, love, patience, kindness, chastity and peace are innate in most persons earth-wide. Lawmakers, whoever they are, are consciously or unconsciously, prompted to ensure that these virtues are manifest in the laws they make. So, when a lawmaker - parliament or a judge - is faced with ensuring that justice prevails in a particular situation it is rewarding if he takes some time and resources to seek what lawmakers have done in one or two other jurisdictions.

In my research, I have attempted to follow the footsteps of sages in law in seeking solution to the problems we all face from a comparative perspective. In my work on corporal punishment, I sought judgments and statutes from UK, US, South Africa, New Zealand, Germany, Barbados, Canada, Mozambique, Botswana, Zimbabwe, Lesotho, Namibia, and the European Court on Human Rights. My book on *Employment Law* contains the law from UK, Canada, Switzerland, Sweden, Solomon Islands, India, Namibia, Trinidad and Tobago, Japan, Australia, New Zealand, US, Francophone African countries and France, among others. The casebook on the *Law of Landlord and Tenant* contains decisions from England, Australia, US and East Africa. The articles on medical law are larded with decisions from India, Canada, UK and US. Indeed, there is not a single work I have done without adequate comparative discussion of the law. Legal research without a comparative touch is insipid; it may be compared to trying to spend a one-sided currency or a coin without an obverse side.

Please come with me as I attempt to show how the law can be used as an instrument to attenuate the harsh realities the weak faces day after day in a world of unequals.

THE HORSE AND ASS IN THE SCHOOL SYSTEM

My research has focused on the lower level of the school system, namely primary and secondary schools. My first line of articles on this was on **corporal punishment in schools**. Sometime in 1994 I read a case comment by Mrs (now Professor) Cordelia Agbebaku of Ambrose Alli University on a Supreme Court decision which held that where a teacher used the cane on an eleven year old girl and she lost one of her eyes the teacher was not liable in the tort of battery because it was an accident. I felt that a case comment of a few hundred words was inadequate to discuss that Supreme Court decision which was the first of its kind in the country. The decision is *Ekeogu v Aliri* [1991] 3 NWLR (pt 179) 258. From the research that ensued, I published four articles and a booklet. One of the articles is published in *Child Abuse and Neglect,* a journal of the School of Medicine, University of Colorado, USA. It has this heartrending title: "Two Deaths, One Blind Eye, One Imprisonment: Child Abuse in the Guise of Corporal Punishment in Nigerian Schools".

In the first article, I examined the legal subtrata of a teacher's authority to inflict punishment on a pupil. I came up with five namely:

1 Parental delegation;
2 Necessity;

3 Preservation of discipline in the school system;
4 Government's duty to ensure there is security everywhere; and
5 Public duty.

We shall discuss these seriatim.

A parent has authority to inflict reasonable bodily chastisement on his child. In accord with very ancient practice which has always commended itself to the commonsense of mankind, parents delegate this authority to schoolteachers. This delegation need not be express; the law implies it in favour of a teacher and school administrator. But suppose a parent expressly withdraws this authority, insisting, without convincing reason, that he does not want his child to be bodily chastised? Decisions from US, England and Nigeria show that under such circumstances where there is a conflict between a parent's interest in his child on the one hand and the teacher's authority on the other, the latter would prevail. The US case is *Baker v Owen* 395 F Supp 294 (1975). The mother of a sixth-grade pupil informed the principal and certain teachers of her objection to her child being corporally punished because she opposed it on principle. Sometime later the pupil violated his teacher's announced rule against throwing kickballs except during designated play periods. For this he was flogged for his disobedience. Mrs Baker unsuccessfully sought a court declaration that the flogging of her child violated her parental right to determine disciplinary methods for her child. Judge Craven conceded a parent's right to determine and choose what type of discipline his child should receive, but concluded:

> Our inquiry does not end with the conclusion that Mrs Baker has such a right but we must go on to consider the nature and extent of the state's interest in school discipline. Sometimes the rights of citizens that find protection within the Constitution are overborne by a countervailing and greater state interest. We think that is the situation here – whether the test to be applied is that of a compelling state interest or simply of a rational and legitimate interest in maintaining order and discipline in the public schools.

In the English case of *R v Newport (Salop) Justices* [1929] 2 KB 416 a 16-year-old schoolboy smoked a cigarette in public, after school hours. This was contrary to a school rule which prohibited smoking by pupils during school terms whether on the school precincts or in public. His schoolteacher gave him five strokes of the cane as punishment. In a criminal proceeding against the schoolteacher for an alleged assault the schoolboy's father testified that the smoking was with his consent, but the schoolteacher was acquitted.

The Nigerian decision is interesting. In *Nwankwa v Ajaegbu* (1978) 2 LRN 230 a pupil's parents prohibited his teacher from punishing the pupil in any manner. His schoolteacher on one occasion urged him to clean up a classroom after school hours. The boy complied but reported this to his parents. The next day the pupil's father drove to the school and directed his driver to beat up the schoolteacher. The battered schoolteacher sued the parent for assault and battery and he was awarded a princely sum as damages.

Second, a schoolteacher's authority to inflict corporal punishment may be grounded on the necessity the school environment imposes. There is no gainsaying the fact that the society we live in, the community where our schools are situate is in turmoil. The dirtiest cheating in history, the gravest injustice anywhere, the filthiest lifestyles, the most heartrending violence and crimes, and the most brazen corruptions have gone on in government – from federal to local. Young school children are not oblivious of these; they emulate these lifestyles, and they carry them to school. So our schools are made up of children prone to violence; children who delight in foul, obscene language; children malnourished or hungry and therefore prone to stealing; and children reared without needed discipline at home. The concomitance of this social problem is that a large number of children of school age are uncared for at home. Children who are left on the loose are unruly; and unruly children are impossible to teach without the threat or infliction of corporal punishment where deserved. That this social necessity can ground a teacher's authority to inflict corporal punishment is gleaned from the New Zealand High Court decision in *Hansen v Cole* (1890) 9 NZLR 272. In the case a schoolteacher caned a student on the thumb and because of improper attention whitlow set in. It was in evidence that the corporal punishment inflicted was neither

unreasonable nor unjustifiable. In the child's action in the tort of battery, it was held that a person suffering a wrong cannot claim from the wrongdoer compensation for consequence which, if he had exercised ordinary prudence, would not have followed. Chief Justice Prendergast said the right of a teacher to inflict corporal punishment is based not on delegation by the parent but on the necessity of the case; not that the parent puts the schoolteacher in *loco parentis* but that the schoolteacher is in *loco parentis.*

Closely linked with the necessity substratum is a teacher's duty to maintain order in the classroom and the precincts of the school. As a result of inexperience, adolescents and youths are known to be generally unruly, disorderly, mischievous and quarrelsome among themselves. In mixed schools sexually active boys may make life unbearable for young girls. In order to instill some modicum of order so that the school system does not crumble, the teacher must be allowed to wield the cane. Without this the upright would be squeezed into the mold of the wicked; the school environment would be unsafe for the good and right-hearted because of the activities of bullies. Granted, teachers do not have a magic wand to turn the wayward to the path of rectitude. Even so, they should be able to rescue the peaceable from the incorrigible; the weak and vulnerable from quick-witted, sharp-tongued and sarcastic youths. In *Mansell v Griffin* [1908] 1 KB 160, 167-8 Justice Phillimore posed the question, `On what does the authority of the teacher to inflict corporal punishment rest?' and answered as follows:

> The ordinary authority extends, not to the head teacher only, but to the responsible teachers who have charge of classes. In other words, a teacher of a class has the ordinary means of preserving discipline.

The fourth source of authority is the verity that a schoolteacher is an agent of government and government is constitutionally authorised to enforce laws intended for public safety, order, morality and health. If judicial authority is sought to found this view, we have that of Judge Powell, Jr of the US Supreme Court who stated:

> Although the early cases viewed the authority of the teacher as deriving from the parents, the concept of parental delegation has been replaced by the view – more consonant with compulsory education laws – that the state itself may impose such corporal punishment as is reasonably necessary for the proper education of the child and for the maintenance of group discipline: *Ingraham v Wright* 430 US 651 (1977).

The fifth and final is public duty. Public duty is closely linked with public policy. We define public policy as the community commonsense and common conscience extended and applied throughout the community to matters of public morals, health, safety and welfare. Public policy states that no one should lawfully do that which has a tendency to be injurious to the public or against public good, and it varies with time, habits, opinions, economic and social needs, customs, and the moral aspirations of the community. It is fluid and fluctuating. Interestingly, in the two reported Nigerian decisions on corporal punishment the judges concluded that teachers' authority to inflict corporal punishment is founded on public duty. Justice Adeloye said:

> It is the teacher's public duty to discipline a student and the punishment to be inflicted except specifically forbidden by law is within the discretion of the teacher. The exercise of the aforesaid power is in accord with public duty: *Olusa v Commissioner of Education, Ondo State and Olaniyan* [1985] HCNLR 1133.

In *Ekeogu v Aliri* Justice Wali of the Supreme Court stated:

> A teacher, *vis-à-vis* his pupils, stands in *loco parentis* to them. In that capacity he has the authority to discipline them. It is a public duty.

Section 295(1) of the Criminal Code and section 55 of the Penal Code justify a teacher to inflict corporal punishment. But this is limited to misconduct of disobedience to `lawful command.' At this point, we shall examine the facts of *Ekeogu v Aliri*. The respondent, Elizabeth Aliri attended school as usual. There was an incident of theft within the neighbourhood of the school. The culprit was apprehended and the crowd that gathered started to beat him. The appellant, the child's class teacher, instructed his pupils to go and watch how thieves were treated so that they could learn a lesson or two.

The pupils complied with the instruction and ran up to watch. A while later the school bell was rung calling the pupils back. As the pupils ran into class, the teacher whipped them indiscriminately. Unfortunately, one of the whips was discharged across the face of the plaintiff. The whip landed on one of her eyes; the eye was permanently lost. Although the judgment of the learned trial Judge was reversed on appeal to the Supreme Court on procedural grounds, the following dictum remains valid. Justice Ugo-Ogoagwu posed the following questions:

> Was the applicant acting in the execution of his duty as a teacher when he sent the respondent and co-pupils in his class to watch the beating of a thief by irate public who had taken the law into their hand? Was there any lesson for the respondent and other pupils to learn from the mob action of beating a thief? If yes, was the lesson beneficial or detrimental to the fledglings including the respondent who then was eleven years old?

His Lordship answered his own question in this instructive manner:

> In answer to the first question the applicant acted outside his official duty as teacher when he sent the respondent and other pupils out of his class to go on their own outside the school compound to watch the commission of assault on a thief. To the second question my answer is that there was a lesson to learn but that lesson was that the pupils could take the law into their own hands without recourse to appropriate authority. Such a lesson was detrimental to the moral upbringing of the fledgling.

The principle here is clear: the law countenances corporal punishment of pupils only to restrain, correct or maintain order in the school system. Where the punishment is for any other purpose, it is for the teacher to justify it. Where he fails, he would be liable in damages for any form of corporal punishment inflicted on a pupil, no matter how modicum.

Jehovah's Witness children have faced continual infraction of their freedom of thought, conscience and religion in this regard. They are regularly subjected to inhuman and degrading treatment because they would not join in religious practices at school, they would not say the pledge, sing the national or school anthem, and they would not salute the flag. Every so often teachers forget that section 38(1) of the 1999 Constitution states: "Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance."

Nor are children the only ones who face the challenge of national observances. When words went round that I was to be appointed Acting Dean of Law, I went to Professor E A C Nwanze, the Vice Chancellor of University of Benin, to beg him to drop my name. He wanted to know why I was declining the offer. One of the reasons I gave is that I would not participate in national observances during public ceremonies and that may embarrass his office. His comment was that the national anthem was just like any other song. Many share this view. But please note what two secular sources say about the flag:

> "[Historian] Carlton Hayes pointed out long ago that the ritual of flag-worship and oath-taking in an American school is a religious observance. . . . And that these daily rituals are religious has been at last affirmed by the Supreme Court in a series of cases."—*The American Character* (New York, 1956), D. W. Brogan, pp. 163, 164.

> The flag, like the cross, is sacred. The rules and regulations relative to human attitude toward national standards use strong, expressive words, as `service to the flag,' `reverence for the flag,' `devotion to the flag.' *The Encyclopedia Americana.*

Jehovah's Witnesses respect the flag by obeying the laws of the country they reside in. They put obedience ahead of observance. Maybe you will find this experience from Canada interesting and instructive. One morning an 11-year-old Witness girl named Terra noticed that the teacher took a fellow student out of the classroom for a few moments. Shortly thereafter, the teacher quietly asked Terra to accompany him to the principal's office. As she entered the office, Terra immediately saw that the Canadian flag was draped across the principal's desk. The teacher then instructed Terra to spit on the flag. He suggested that since Terra did not sing the national anthem or salute the flag, there was no reason why

she should not spit on the flag when ordered to do so. Terra refused, explaining that although Jehovah's Witnesses do not worship the flag, they do respect it. Back in the classroom, the teacher announced that he had just tested two students, instructing them to spit on the flag. Although the first student did participate in patriotic ceremonies, she nevertheless spat on the flag when ordered to do so. However, even though Terra did not sing the anthem or salute the flag, she refused to dishonor it in this way. The teacher pointed out that of the two, Terra was the one who showed proper respect: *Jehovah's Witnesses and Education,* New York, Watchtower Society, 2002, 20.

When anthems are sung or the pledge is recited or persons choose to stand for the flag, Witnesses do not disturb those who participate. That is their belief or conviction. Witnesses in turn expect those in authority, the horses, to let those who conscientiously object alone. It may interest those who insist on national observances against the wishes of Witnesses to know that the Flags and Coat of Arms Act 1960 does not provide that it is imperative that people should stand up when the flag is hoisted; nor is there a statute that sets up the national anthem much less a provision that says every citizen should sing it. The ceremonies surrounding the flag, anthem and pledge are matters of conventional custom, not legal rule. And as we noted earlier, conventional custom is the least significant in legal hierarchy; until either parliament or the court says so, the infraction of a custom is not illegal. In contrast, the constitutionally protected right of privacy which means a right to be let alone as well as the freedoms of thought, conscience, and religion are at the very apex of the legal hierarchy. Indeed, as a country's legal system grows, the force of custom should diminish.

Indeed, practicing my beliefs as a Jehovah's Witness sometimes means hurting the ego of certain persons in authority. Take a few examples: for conscientious reasons I would not participate in public prayers said by a non-Witness; I would not participate in any form of worship not presided over by a fellow Witness; I would not join any cultural or political association; I would neither vote nor contest for position on matters I consider have political undertone; I would not rise or observe silence for a dead person; I would not attend a wake. In these matters and others I plead that I should not be punished or be subjected to prejudice because:

1. The position I take is not prejudicial to other person's rights;
2 My position does not breach the peace of society;
3 My conviction agrees with the principle that liberty of conscience is every person's natural right;
4 My view accords with the democratic philosophy which we practice. Contrary to general views, democracy is more than occasional visit to the polls to cast votes. One of the foundational philosophies of democracy is that while the majority has its way, the minority must have their say and be let alone so long as their practice does not adversely threaten the peace of the society.

What is more,

1 The alternative view others hold and they may want to impose on me is impeachable because we are all sinners, imperfect and fallible;
2 You cannot change my view by the use of force; if you use the tool of persuasion and you succeed in changing my views, that is acceptable;
3 I urge all to appreciate that sincere men disagree;
4 Noble-mindedness suggests that tolerance of other's views and beliefs is golden. Jesus Christ is a perfect example of this. In Luke 9:52-56 we read that our Lord rebuked his disciples who wanted to call down fire from heaven to raze the Samaritans who refused them a right of way. Should we not learn tolerance from Jesus Christ?

A second aspect of teachers' abuse of authority is in the area of **use of pupils for errands.** Sometime in 1998, I was in a village preaching the good news of God's Kingdom when I saw school children between the ages of six and 15 in cassava farms working enthusiastically. When I wondered aloud why pupils should be working in the farm in their uniform and during school hours, I was told that it was part of their homework. I decided to search into what the law says on the authority of teachers to send pupils on errand.

My findings were published under the title "Authority of Teachers to Send Pupils on Errand," (1999) *Nigerian Education Law Journal,* vol 2, No 1, pp 1-9. They show that judges hold the view that errand is part of education. The prevailing view is that mere stuffing of information into pupils may make them very priggish, bigoted and haughty; it would not make them of much use in life unless they know how to apply that information for the purpose of becoming useful citizens. Education must widen and improve the mind and outlook of pupils. Errands give children knowledge of the environment in which they will ultimately live and work.

Way back in 1911 in the case of *Smith v Martin & Kingston Upon-Hill Corporation* [1911] 2 KB 775 a young lady of fourteen was directed to a room used in common by teachers to poke the fire and draw out the damper in order that the teacher might be able to heat her food. While she was attending to the fire the lady's pinafore caught fire and she sustained severe burns. She sued the teacher and joined the teacher's employer, the corporation, vicariously. The corporation denied liability contending that the teacher was on her own frolic; that she was employed to teach pupils and not to send them on errand. The contention was rejected; the pupil was awarded damages. Our concern is in the following mordant dictum of Justice Farwell:

> It is contended that it was not part of the business of the teacher to send the child on any errand of her own, but that their business is confined to teaching. This is to draw a distinction between education and teaching which, if adopted as sound, would have a most prejudicial effect on these schools. In my opinion [statutes establishing schools] are intended to provide for education in its true and widest sense. Such education includes the inculcation of habits of order and obedience and courtesy: such habits are taught by giving orders, and if such orders are reasonable and proper, understanding the circumstances of the case, they are within the scope of the teacher's authority, even although they are not confined to bidding the child to read or write, to sit down or to stand up in school, or the like. It would be extravagant to say that a teacher has no business to ask a child to perform small acts of courtesy to herself or others, such as to fetch her pocket handkerchief from upstairs, to poke the fire in the teacher's room, to open the door for a visitor, or the like: it is said that these are for the teacher's own benefit and to save herself trouble, and not for the child's benefit, but I do not agree: not only is it good for the child to be taught to be unselfish and obliging, but the opportunity of running upstairs may often avoid punishment: the wise teacher, who sees a volatile child becoming fidgety, may well make the excuse of an errand for herself an outlet for the child's exuberance of spirits very much to the benefit of the child. Teachers must use their common sense, and it would be disastrous to hold that they can do nothing but teach.

So sending pupils on errand is lawful. Yet, it is not enough to show that the errand would give the child knowledge since not all knowledge may be considered as education. To take an extreme example, Justice Rigby once said that instructing pickpockets in a thieves' kitchen to make them fit for their profession is acquisition of knowledge but not education: *Re Macduff* [1896] 2 Ch 451, 474.

In the article I also drew attention to section 38(2) of the 1999 Constitution which provides that no person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if such instruction, ceremony or observance relates to a religion other than his own, or a religion not approved by his parent or guardian. Thus any errand that infringes on the religiously trained conscience of a pupil is outside the authority of a teacher to request an objecting pupil to run. A pupil may refuse to purchase cigarette, pork, alcohol, medicine, religious materials, or cosmetics for his teacher, or work on a particular day of the week, depending on his religion or denomination. The Constitution makes abundantly clear that parents determine the religion of their children, not teachers.

Where it is evident that a teacher uses pupils for his financial ends, the law should step in to protect the pupils. Even where this brings a pupil material benefit, the education of a child in the materialistic sense is not sufficient to allow the court to dispense with his long term welfare. Teachers should not be permitted to overcome the inevitable disability of their financial situation at the expense of pupils.

The third aspect of my research in this respect examines the **liability of school proprietors for injuries to pupils.** With the deterioration of public schools, private schools have mushroomed in the past two decades. As a result of poor supervision by officials of the Health and Education Ministries coupled with either absence of standards or their non-enforcement, school proprietors have a field day using all manner of premises as schools. In many cases teachers and other support staff are inadequate and ill-qualified for the monumental responsibility of caring for children of tender age. With decisions from Scotland, England and Nigeria, I was able to formulate the following principles:

1. Where children are permitted to use premises the duty of school proprietors towards children in school premises is higher than that towards adults. Since a danger which would be obvious to adults would not necessarily be appreciated by children, the occupier's duty in the case of children is not confined to concealed dangers. He is bound to use reasonable care to protect them from injury. In the Scotch case of *Cormack v Wick School Board* [1909] 2 KB 775 a school board was held bound to keep a gate, part of the school premises which it knew was used by children, in repair; the Board was held liable in damages for negligently failing to keep it in a safe condition.
2. The law imposes a duty on school proprietors to ensure that playgrounds are safe. In *Ching v Surrey County Council* [1910] 1 KB 736, the plaintiff, a pupil at an elementary school, fell while playing in the playground through his foot being caught in a hole in the asphalt pavement of the playground, and sustained injury. The plaintiff succeeded against the school authorities. The court held that a school proprietor has a duty to keep the school efficient, that is to say, to keep the premises in a proper condition as regards health and comfort, a proper place for the reception of children, as regards the school for the purpose of teaching and as regards the playground for the purpose of exercise and recreation.

THE PATIENT AS AN ASS, THE PHYSICIAN AS A HORSE

The sad reality we all face is that sometime in life we must see a physician or a paramedic. No matter how exalted a person is, as a patient, he is at the mercy of the medical caregiver. He is an ass yoked with a horse who may be a physician, nurse or any other paramedic. One and all deeply appreciate the services medical caregivers provide. Yet, the attitude of some medical personnel towards patients makes many feel vulnerable and unprotected.

Yes, some physicians exalt themselves to the position of thin gods. They fail to realize that a patient has rights. The book *The Rights of Patients – The Basic ACLU Guide to Patient Rights* (published by the American Civil Liberties Union) lists the following ten rights of a patient:

1 Considerate and respectful care by competent personnel.
2 Obtain from his physician complete and current information regarding his diagnosis, treatment, and prognosis in terms the patient can understand.
3 Receive from his physician information necessary to give informed consent prior to the start of any procedure and/or treatment, where medically significant alternatives exist, the patient has the right to such information.
4 Refuse treatment to the extent permitted by the law.
5 Every consideration of privacy concerning his own medical-care program.
6 Expect that all communications and records pertaining to his care will be treated as confidential.
7 Expect that, within its capacity, a hospital must make reasonable response to the request of a patient for services or for transfer to another facility when medically permissible.
8 Obtain information as to any relationship of the hospital to other health-care and educational institutions as far as his care is concerned.
9 Be advised if the hospital proposes to engage in or perform human experimentation affecting his care or treatment.
10 Expect reasonable continuity of care and to know in advance what physicians are available and where.

Many who have found themselves as patients or patients' caregivers know that in this country, some members of the medical community do not treat patients as if they have rights of any sort. The bitter experience is that patients are treated as infants; most physicians and their assistants play the uncompassionate parent over them.

I have two published articles relating to patient's rights. Expectedly, as a Jehovah's Witness, both articles touch on the issue of blood transfusion. Two points may be noted in parenthesis. All that most persons know about the interplay of medicine and law is negligence. However, in the past half a hundred years, the concept of informed consent to diagnosis, therapy and experimentation has become even more topical. The concept is that before a physician carries out any procedure, he must fully explain the procedure, the pros and cons, also any likely adverse effect of the procedure. He may proceed only after the patient has consented. Where a patient withholds consent and a physician steamrolls his views and proceeds to cure the patient, the physician remains liable to the patient in the tort of battery; it is of no moment that the patient has improved health. At common law this is called right to bodily self-determination; under the Constitution it is the right to privacy, the right to be left alone. The second point is a question: Why, you may ask, do Jehovah's Witnesses reject blood transfusion? Their staunch rejection of blood transfusion stands on two stilts: belief that God's law on blood as expressed in such scriptures as Genesis 9:3, 4; Leviticus 17:10-14; Deuteronomy 12:23; Acts 15:20, 28, 29 in the Holy Bible should be applied literally; also an unflinching conviction that if any dies loyal, he would be resurrected to a better life under Christ's kingdom rule which they believe is at hand: John 6:40. They are not fatalists as they accept non-blood volume expanders and other non-blood management of ailments.

The Court of Appeal decision in *Okonkwo v Medical & Dental Practitioner's Disciplinary Tribunal* [1999] 9 NWLR (pt 617) 1 prompted the first article. Pithily, here are the facts of the case. Martha Okorie, a Jehovah's Witness, was delivered of a baby on July 29, 1991. She suffered post-birth complications and so was admitted on August 8. The physician recommended blood transfusion but she withheld consent to this therapy. When her condition deteriorated she was discharged. On August 17 she was admitted at a hospital where the appellant, Dr John Okonkwo, was the medical director. On admission she produced a duly signed advance medical directive wherein she declined blood transfusion, but opted for non-blood expanders. Sadly, she died five days later. It turned out that Dr Okonkwo is one of Jehovah's Witnesses. Martha's mother who did not share her faith as one of Jehovah's Witnesses, caused the appellant to be tried by the Medical and Dental Practitioners Disciplinary Tribunal. The Tribunal found him liable of infamous conduct in a professional respect and was suspended from practice for six months. Dr Okonkwo's appeal to the Court of Appeal succeeded. Within weeks after the judgment, I wrote an article that was published in the *Guardian.* This article provoked considerable reaction from many writers. We attempt to address some of the issues raised by the Tribunal by way of an outline here.

1. Dr Okonkwo was right in treating Martha in accord with her wishes; a physician who does so incurs no liability so long as he tried his utmost. Rule 5(1) of the Rules of Professional Conduct for Medical and Dental Practitioners in Nigeria 1980 (hereafter Rules of Professional Conduct) provides that practitioners must always obtain the consent of the patient or the competent relatives before embarking on any special treatment procedures with determinable risks. Even the most optimistic physician knows that blood transfusion is fraught with risks.
2. Dr Okonkwo was right in not interfering with Martha's decision. Principles 1(a)(b) of the World Medical Association Declaration of Lisbon on the Rights of the Patient 1948 (revised 1995) (hereafter Rights of the Patient) states that every patient has the right to be cared for without any outside interference and in his best interests. For this right to bear any modicum of meaning, the prohibited outside interference must include a doctor's interference which is at variance with a patient's position.
3. Dr Okonkwo was right in discountenancing the pleas of the patient's relations. The combined effect of Principles 3, 4 and 5 of Rights of the Patient is that recourse is had to the opinion of patient's relation where the patient is unconscious or legally incompetent either on the grounds of

age or mental impairment. Even in such cases the relation can only take a decision that accords with the patient's earlier stand. In *Matter of Dubreuil* 629 Southern Reporter 2d 819 Florida 1993), the Florida (US) Supreme Court held a hospital liable in trespass for overruling a patient's decision not to accept blood transfusion in favour of her husband's counter directive. The inviolable rule is that where a patient has left instructions regarding life-sustaining treatment, the surrogate must make the medical choice that the patient, if conscious, would have made, and not one that the surrogate might make for himself, or that the surrogate might think is in the patient's best interests.

4. Should a physician withdraw from treating a patient merely because he rejects blood transfusion? This is a common practice in Nigerian hospitals. In a number of cases as soon as a patient declines blood transfusion on conscientious ground he is branded a Witness and he is left to rot. Rule 21 of Rules of Professional Conduct states that a physician may withdraw from treating a patient only where the patient advocates a process of treatment that is unjust or immoral. On the basis of this, some say that when a person rejects blood transfusion, he is attempting suicide. Section 327 of the Criminal Code provides that any person who attempts to kill himself is guilty of an offence and is liable to imprisonment for one year. To ground conviction, the prosecution must prove either that the patient, by going to hospital, intends to kill himself, or intends to kill himself by rejecting blood transfusion in preference for scientifically attested alternative non-blood management. Which of these is logical?
5. The Tribunal suggested that a physician must preserve his patient's life at all costs. With great, respect, that is not part of the ethical obligation of a medical practitioner. Principle 3(a) of Rights of the Patient states that the patient has the right to self-determination, to make free decisions regarding himself. If this principle has as its foundation the right to bodily integrity and control of one's own fate, then it is superior to the institutional considerations of physicians.
6. Where a physician proposes a therapy which a patient rejects two interests are in conflict: One is the physician's duty to save life, the other is the patient's right to be treated the way he deems best. The physician's duty is rooted in conventional custom, professional ethics; the patient's right is rooted in the constitutional right to privacy – a right to be left alone. As we noted at the introductory part of this lecture, constitutional right is far superior to custom or ethics.

The Medical and Dental Practitioners' Disciplinary Tribunal appealed the *Okonkwo* case to the Supreme Court. Again, Dr Okonkwo won. Even so, I noted a gratis obiter dictum in Ayoola JSC's judgment that does not represent the law and practice of medicine and I wrote on it. His Lordship says that where a patient rejects medical treatment, the physician may, among other things,

(a) abandon the recalcitrant patient to rot, or
(b) discharge him without more treatment, or
(c) apply to the court for an order to treat the patient in accord with the physician's desire.

His Lordship is, with respect, in error when he suggested that a physician may abandon a recalcitrant patient to rot. Article 1(f) of the Right of the Patient states that a patient has the right to continuity of health care. And Rule 28(g) of the Code of Medical Ethics in Nigeria 2004 classifies as professional negligence a physician's failure to refer or transfer a patient in good time when such a referral is necessary.

Justice Ayoola's suggestion that a physician should apply to a judge for licence to treat a patient against his will does not accord with the law. The English Court of Appeal has directed that where an adult patient is competent and expresses his wishes either orally or by way of a valid advance directive that is sufficient in scope to cover the situation, an application to the court is pointless. This was in the case of *St George's Healthcare NHS Trust v S, R v Collins, ex p S* [1998] 3 All ER 673, 702-704. In this case, a pregnant patient wrote out her objection to caesarean in unequivocal terms yet the court to which the hospital applied ordered a caesarean. Even though she had her baby and both were in good health, her appeal to the Court of Appeal to have the order reversed succeeded.

The reason is clear: The court usually yields to the physician's opinion on the assumption that the treatment proposed is necessary in the patient's best interests. However, this consideration disappears where a patient's position is unequivocally evident. The courts substitute the earlier assumption with the rule that an individual is the ultimate judge of what is best for him, not any third party no matter his noble-mindedness. We share the sentiments of Dworkin when he says:

> Because we cherish dignity, we insist on freedom, and we place the right of conscience at its center, so that a government that denies that right is totalitarian no matter how free it leaves us in choices that matter less…. We want the right to decide for ourselves, and we would therefore be ready to insist that any honourable constitution, any genuine constitution of principle, will guarantee that right to everyone.

Many who urge that blood transfusion should be given to preserve life even against the wishes of a competent adult found their argument on the sanctity of life, that the preservation of life is absolute. However, not a few have shown that the dignity that is brought to life is more important that empty shell life. In the English case of *Airedale NHS Trust v Bland* [1993] 1 All ER 821 the respondent was in a permanent vegetative state with no consciousness. The issue before the House of Lords was whether the medical support measures should be discontinued. In the course of his judgment, Lord Hoffman said courts do not pursue the principle of respect for life to the point at which it becomes almost empty of any real content involving the sacrifice of other important values such as human dignity and freedom of choice. The House of Lords ordered that the support mechanism may be discontinued.

We may take one or two commonsense examples to show that preservation of life has never been the chief value to humankind. Many members of the military force are honoured and extolled even though their prime assignment is to take life. Why? Because those who extol them believe that the preservation of the territorial integrity of the nation is more important than life. At the 2002 African Nation's Cup in Mali an Algerian player lost his life in the match against Cameroon. His corpse was wheeled out of the pitch and the match continued as if nothing happened; the competition was not cancelled as a result. Why? Because the players (his teammates inclusive) considered the deceased of less value than the competition. A number of boxers have died either in the ring or shortly after a bout, but many still delight in participating in the game and watching it. The deaths have not prompted the organizers to abolish the sport.

I wish to cap this part on medicine and law with a discussion of the treatment of children. Many physicians, with sincere concern for the welfare of children, would not hesitate to extricate children from their parents and transfuse them with blood against the unequivocal objection of their parents who may be Jehovah's Witnesses. To a large degree the matter has been settled by the House of Lords in the case of *Gillick v West Norfolk & Wisbech Area Health Authority* [1985] 3 WLR 830. The issue was the lawfulness of a notice issued by the English Department of Health and Social Security to the effect that, while it was desirable to consult the parent of a person under 16 who sought contraceptive counseling and treatment, the relationship between doctor and (child) patient was confidential, and the doctor retained the right to exercise his clinical judgment not to make such consultation when, in exceptional circumstances, he thought it against the child's interests to do so. Mrs Gillick, who had five daughters under 16 (the age of decision on sexual matters under English law), sought a court order to restrain the authorities from providing her daughters contraceptive without her consent. The issue turned on whether a parent had authority to interfere with a child's decision so long as the child manifests sufficient acuity. Mrs Gillick lost. The House of Lords held that a child's age is not the deciding factor; its level of understanding should be the chief consideration. Lord Scarman said:

> I accept also that a doctor may lawfully carry out some forms of treatment with the consent of an infant and against the opposition of a parent based on religious or other grounds. The effect of the consent of the infant depends on the nature of the treatment and the age and understanding of the infant: [1985] 3 WLR at 869.

Interestingly, the Code of Medical Ethics in Nigeria published by the Medical and Dental Council of Nigeria in 2004 states

> Children younger than 16 but not below 13, though considered as minors, but of clear mind and can grasp the benefits and consequences of accepting or rejecting a proposed treatment, `Gillick-competence,' can give an acceptable consent: article 3(c)(ii)

The rule as formulated by the English House of Lords does not stipulate a lower age limit; but the Medical and Dental Council inserts age 13. Since judge-made law is superior to an association-made regulation, it is hoped that where a prodigy of 10 or even below takes a firm stand on medical treatment and the issue comes before a Nigerian judge he would be inclined to follow the lead of the House of Lords, and jettison the Code of Ethics.

The *Gillick* competence rule does not foist a physician's authority over that of a parent. It merely foists an understanding and intelligent child's right to decide over that of his parent. In the *Gillick* case Lord Scarman clearly stated:

> Until the child achieves the capacity to consent, the parental right to make decision continues save only in exceptional circumstances. Emergency, parental neglect, abandonment of the child or inability to find the parent are examples of exceptional situations justifying the doctor proceeding to treat the child without parental knowledge and consent.

Pointedly, there is no authority or duty on a physician or a judge to steamroll a parent's objection to blood transfusion and treat a child in the name of ethical considerations.

WOMEN AT WORKPLACE

In the past couple of decades a large number of the fair sex has squeezed themselves into formal employment. This is delightsome as they are thereby empowered to better care for themselves, any children they may have, their parents, and even their husbands. More than that, formal employment and earning one's own income give employees unique dignity and self esteem.

As it is, in most establishments men continue to occupy top management positions. And women show little interest in trade union activities which, where they are permitted to exist, is the only meaningful source of checking managerial discretion.

Out of my concern for the weak – in this case, women employees, I have researched into three areas of concern for women employees: Sexual harassment, right to proceed on maternity leave and retention of employment thereafter, and tax relief for women employees.

As we shall show below, Nigerian law permits employers in the private sector to terminate an employee without adducing any reason and without affording him a right to be heard. The reason may be noble, ignoble, or none whatsoever. Consequently, where a lady is subjected to **sexual harassment** and she refuses to succumb, the employer (which in many cases means a sex-mad immediate superior) may simply relieve her of her employment. At best, she is paid a month's salary in lieu of notice. Take for instance what happened in the case of *Sogbetun v Sterling Products Ltd* [1973] (1) ALR Comm 323. Miss Sogbetun, a registered pharmacist, had her appointment terminated with no reason adduced. She claimed damages for wrongful termination on the ground that her immediate boss subjected her to constant sexual harassment and her resistance motivated the termination. Even though Justice Dosunmu acknowledged that the treatment meted out to the plaintiff whom he described as "a highly qualified and professionally competent employee" was "a bit rough," he upheld the termination. The cant is that the motive which compels an employer to terminate an employee is irrelevant.

The female employee in *Ezaga v Embechem Ltd* [1981] 1-3 CCHCJ 119 was more fortunate. Mr Ezaga terminated the appointment of a lady clerk who worked in his department. She protested to her union on the ground that she was terminated because she would not succumb to Mr Ezaga's lecherous advances. In protest, the union called out its members on strike. Management responded by setting up a panel that investigated the allegations of Mr Ezaga's escapades at which four ladies, three of them married, testified against him. In the meantime, the lady clerk was reinstated and transferred to another department. Based on the panel report, Mr Ezaga was terminated. His action for wrongful termination was dismissed. The union's intervention saved the lady's employment; if she had gone to court very likely her action would have met the same fate as Sogbetun's.

In my book, *Employment Law,* I condemned this practice and called on the judiciary to wake up to their duty to protect the womenfolk. In almost all known jurisdictions in the world, the rule is that the court has an abiding duty to impose on employers to show cause why a particular employee is relieved of his employment whether it is by summary dismissal, termination, retirement or retrenchment. Indeed, section 15 of the Ghanaian Labour Act 2003 (Act 651) makes sexual harassment a ground for termination of employment by the employee. That is, an employee need not wait until she is terminated before she can cry out. She is at liberty to resign, and claim damages from her employer for prompting her resignation. This is called constructive dismissal. Will Nigerian parliament ever get to this point? Will Nigerian judges ever embolden themselves to take advantage of Constitutional provisions to save the fair sex in the labour market the harassment some – maybe a goodly number of them – face daily?

Turning to the second part of this subhead, section 54 of the Labour Act 1973 provides **maternity protection for pregnant employees.** Although the section does not provide that the pregnant employee must be married, many employers in the private and public sectors deny unmarried employees maternity leave. I do not advocate free sex; my thesis is that the maternity protection the law affords women enures for the benefit of mother, the unborn and the neonate.

Second, the Labour Act contains no provision for a pregnant employee to be absent from work for ante-natal care. Pregnant employees rely on the goodwill of their immediate supervisors for leave of absence. In my book, *Law Relating to Maternity Leave,* I advocated the adoption of section 13 of the Employment Act 1980 (UK) which provides that an employee who is pregnant and who has made an appointment to attend at any place for the purpose of receiving ante-natal care shall have the right not to be unreasonably refused time off during her working hours to enable her to keep the appointment.

Again, the Labour Act provides that if a woman is absent from work on maternity leave, she shall be paid only 50% of her wages if she had been employed for a period of six months or more prior to her absence. For pregnant Corps members it is even worse. Paragraph 8(4) of the National Youth Service Corps Bye-Laws provides that no allowance shall be payable to a member when she is on maternity leave. We consider these provisions very unfortunate. It is at this time that the expectant mother needs all the money to purchase nutritious food for herself and the expected baby; and after birth, enriched diet is indispensable for nourishing breast milk. We commend employers who `disobey' these provisions and pay pregnant employees their full entitlement during maternity leave. The amount involved is so insignificant that it does not really hurt a benevolent employer's purse.

Further, the Labour Act provides that no employer shall be liable to pay any medical expenses incurred by a woman *during* or on account of her pregnancy. Read literally, it means that a pregnant employee who is ordinarily entitled to medical care for physical injuries, malaria, or headache is barred from going to the employer's clinic, and where she incurs medical expenses the employer would not be obliged to reimburse her. I advocated the redrafting of the provision. An employee who undergoes prenatal tests such as ultrasound or amniocentesis should not expect her employer to pay the bill. But medical expenses that are not related to her pregnant condition should continue to be borne by the employer. Interestingly, by *Circular No 12 of 1979* issued by the Federal Ministry of Establishments, it was provided that female married public servants and the wives of male public servants should be entitled to free medical treatment including pre- and post-natal treatment. In 1984 this provision was rescinded by the extant *Circular No B63304/VIII/112*. The earlier circular was issued when Mrs F Y Emmanuel was Head of Service; the 1984 circular was issued by Mr Gray Longe.

Perhaps, the most hurtful aspect of the law relating to maternity leave is that Nigerian courts have no regard for the Labour Act which provides that where a woman is absent from work as a result of maternity leave, no employer shall terminate her appointment. Very sadly, in *Ajiboye v Dresser Nigeria Ltd* [1972] 7 CCHCJ 57 and *Okunbowa v Group Consultants & Project Advisers Nigeria Ltd* [1974] 2 CCHCJ 159 Justice Adefarasin and Justice Adeoba respectively held that an employee who proceeds on maternity leave may be terminated so long as the usual wages in lieu of notice has been given. (The Labour Act merely reproduces the provisions of the Labour Code Act 1945 under which these cases were decided). Indeed, in *Ajiboye* Justice Adefarasin said:

> It may well be that the manner in which the defendants determined her employment only one day before she was due to resume duty [after maternity leave] was in bad taste. Nonetheless the defendants were entitled to determine her employment with one month's notice or one month's wages instead of notice.

Recall the cant, `an employer may terminate an employee even for no reason.' Evidently, Nigerian judges are unwilling to question the exercise of managerial discretion. The horse may trample the ass for all they care.

Remarkably, in a 1987 study by Humphrey, he notes that mothers dedicate themselves to their work more than their younger childless colleagues. They realize that they have to keep their jobs in order to care for their children. The study found working mothers responsible and productive even more than men. Management can only get the best from these ladies when they are adequately provided for rather than a closefisted attitude. Complementarily, I mentioned that entrepreneurs have social responsibilities they should not be permitted to shirk. The profit drive should not be the sole goal of an establishment. The welfare of labour as well as the larger society is not to be neglected.

I concluded my work on maternity leave by suggesting that the federal government should enact a law to obligate government departments as well as all large and medium scale employers of labour to keep a minimum percentage of women (whether or not they are of childbearing age) on their employment.

With respect to **tax relief**, I noted that a considerable number of women bear the burden of raising their children. Aside from single parenthood which arises from separation or divorce, and a husband's early death, there is the widespread practice of polygyny as well as out-of-wedlock births. UNICEF reports that 36 per cent of all married women in Nigeria are in polygynous union and 22 per cent of girls aged 15-19 become mothers. (*Wake-up Call,* 2001) These unwed mothers and mothers in polygynous homes are usually left to bring up their children all by themselves, with little or no financial assistance from the man who put them in the family way. Those among them who are able to acquire some modicum of education and obtain paid employment must seek ways to enhance their take home pay by seeking tax relief.

My research on this was prompted by a misinformation that appears in Theresa Akumadu's *Beasts of Burden: A Study of Women's Legal Status and Reproductive Health Rights in Nigeria,* 1998. She there states that single mothers are taxed without consideration to their dependents, as if they are childless. She relied on the obsolete, repealed Income Tax Management Act 1961 rather than the extant Personal Income Tax Act 1993 (PITA).

I did not only discuss the new law, but proffered suggestions. PITA provides that relief can be claimed for a child who receives full-time instruction in a school or who is apprenticed in a trade. No age limit is imposed. I called on the Federal Inland Revenue Service (FIRS) to redraft Form A (tax relief form) which stipulates age 21. This is *ultra vires* FIRS. I called for a graduation of child allowance in view of the fact that most children are in private schools and the cost of maintaining them there rises as they grow older. And in the absence of crèches at workplaces I suggested that tax relief be extended to resident relations, nursemaids or helps who care for children and infants while mother is at work.

HUSBAND AS HORSE, WIFE AS ASS

Maybe nowhere is their evidence of male chauvinism as in the attitude of Nigerian and English judges to matrimonial property. In most parts of US and in continental Europe, in a nutshell, the rule is that all properties acquired after marriage are jointly and equally owned by husband and wife. It is of no moment that one spouse keeps the home or does nothing or is childless.

Under the English common law which we received into the country, the rule may be summarised as follows:

1. The wife must stay wherever the husband provides as shelter.
2. The wife is entitled to shelter, and the husband cannot deprive her of a place in the matrimonial home either by force or by subterfuge.

3 Where the man (or woman) builds a house or acquires any moveable property solely with his money, the wife has no right to the property either upon divorce or separation.
4 Where the woman contributes indirectly to the acquisition of the property, she obtains no interest in the property.
5 Where she contributes directly but insignificantly (such as contributing less than 10% of the cost of building a house), she gets nothing.
6 Where her contribution is direct and substantial, she may be paid a percentage of her contribution.
7 The word `may' is used in 6 because this depends on her ability to prove by convincing evidence that she made direct and substantial contribution.
8 A wife's intangible and unquantifiable domestic contributions are disregarded. She is perceived as an unpaid servant of her husband.

The leading English decision on the point is *Pettit v Pettit* [1970] AC 777. In the case the House of Lords held that a spouse who is unable to prove direct and substantial financial contribution to the acquisition of the matrimonial home has no right in the property. The English parliament quickly reversed the House of Lords decision with the Matrimonial Proceedings and Property Act 1970. It provides that a husband or wife who has made a *substantial contribution in money or money's worth* to the improvement of real or personal property in which either or both of them has a beneficial interest, will be treated as having a share in that property.

A number of African countries have enacted statutes to protect wives thereby reflecting the equality between men and women espoused by their post-independence constitutions. Section 7 of the Matrimonial Causes Act 1986 of Zimbabwe is an example. It expressly provides that the court should take into account the contributions made by a wife (whether married under customary law or under the Marriage Act) by looking after the home and caring for the family and any other domestic duties. Another example is the Tanzanian Law of Marriage Act 1971 which empowers the court to order the division between parties of assets acquired by them, and in doing so the court shall have regard to the extent of the contributions made by each party in money or work towards the acquiring of the assets. The courts have held that `work' includes domestic efforts of husband and wife.

While we keenly await parliamentary or judicial intervention to save Nigerian womenfolk, my students will testify that I have always advocated that women should learn to keep accurate record of their contribution to any and all properties they own solely or jointly. To women I urge: Keep receipts of purchases, keep diaries, ensure there are witnesses (such as your children or the relations of the man) to transactions where you make any contribution! Please do these discreetly, not frontally. Indeed, disputes arise only where there is something substantial to share and there is disharmony in the immediate or extended family. Even so, a stitch in time saves nine (even all), the sages say.

For the men folk, I urge that we widen our heart and thought. It is arrant nonsense to say that when a wife begins to acquire her own property, she would develop and display disloyal tendencies. This has not been proven scientifically or socially. The proposition is akin to the unproven and baseless view that pretty ladies do not last in marriage, or that light-skinned ladies have a tendency to be whores.

Another way women can take their fortune in their hands is to ensure they marry under the Marriage Act. And this can be done at any time, even after 50 years cohabitation or marriage under customary law. The Act marriage (not the same as mere church blessing) protects women more. At least, there is a certificate issued by a government office which serves as evidence of the marriage. Customary law marriages are oral; the affidavits sworn to by one spouse does not bind the opposing party who may deny the existence of a marriage. Again, marriage under the Marriage Act can only be dissolved in a High Court. The time-consuming litigation and cost involved discourage rash divorce. And the Matrimonial Causes Act 1970 (MCA) provides the only grounds upon which divorce may be decreed. Under customary law, divorce can be obtained extra-judicially, and for any frivolous ground. Even where the parties go to a Customary Court, the proceedings may last for less than a few months. Upon divorce, section 72 MCA empowers the court to make such order as it deems equitable for the maintenance of a

spouse who is financially disadvantaged; almost always this is the wife. In place of this discretionary provision, I advocate a rigid provision which provides for one half, or one third or one quarter for a disadvantaged spouse. Leaving the matter at the discretion of the judge is unsafe because most judges are men and it will take some little time for many of them to get over their male chauvinism. Finally, upon death, a surviving spouse is entitled to one-third of the personalty (shares, cash, cars, clothing etc) the deceased leaves behind. A woman who is married under customary law does not enjoy any of these benefits.

BANK AND CUSTOMER

In the area of banking law, I have a 460-page casebook and seven published articles. I will highlight some aspects of the law where I have advocated the reform of the law to assist the ass (customer) in the face of oppressive rules by banks, bankers and law enforcement officers.

In my article on **lodgment of cash with banks**, I noted that banks are wont to dismiss their employees who collect cash from depositors, steal them and fail to credit the customer's account. Since the customer would be unable to prove the name and features of the bank employee he paid money to, he may be unable to prove his case. In the article, I encouraged depositors to ensure that no matter how crowded the banking hall may be, payment of cash should only be made to cashiers or the bank manager. Be alert to ensure that the cashier or manager stamps your pay-in-slip with the regular rubber stamp which only cashiers keep. The inkpad is unique, different from others in the bank. The law is that once a depositor is able to put in the proper pay-in-slip, it is immaterial that he is unable to prove the actual person who received the money from him.

A customer who borrows money from a bank must insist on obtaining and carefully reading the statement of account. The Supreme Court has held that **a bank is at liberty to increase interest rates without informing the borrower** so long as there is a clause in the mortgage deed or loan agreement to that effect: *Union Bank v Ozigi* (1994) 15 LRCN 257. I criticized this judgment on the ground that even if a bank is at liberty to unilaterally increase interest rate, it must notify the borrower before the increase or shortly thereafter. In the absence of such notification, the increase should be avoided.

The police have used an old statute, Bankers' Books Evidence Act 1879, to **freeze customer's accounts** in a manner that assaults commonsense, good judgment and the constitutional provision on right to privacy. The Act was enacted to enable banks tender evidence of a customer's bank account without hindering the bank's daily operations. Very sadly, the Nigeria Police Force has fashioned a form which they fill in, present to a Magistrate or Judge who absented-mindedly indorses it. The form is presented to a bank manager where a suspect's account is kept and the account is frozen with immediacy. The customer is not afforded an opportunity to be heard before the account is frozen; the allegation may be the most frivolous and unfounded. Indeed, when I sent the article on this to *The Police Journal* in Isle of Man, Britain, the editors could not believe that such abuse of human rights exist. They wrote me to provide my source materials. The article was published upon my response.

Closely related to this is the **Central Bank of Nigeria's abuse of its authority to order the freezing of customer's accounts**. Shortly after the September 11, 2001 attack on the World Trade Centre in New York, the Central Bank, apparently on the prompting of `the police of mankind,' the US government, wrote all banks to provide information on the status of the account of all persons suspected to be terrorists. This was with the goal of freezing their accounts. Woe betides anyone who has had a face-off with a bank manager! In my article on this, I argued strenuously that the authority to freeze a bank account lies only with:

1 The President of the Federal Republic under the Banking (Freezing of Accounts) Act 1984. And this authority is not infinite; it extends only to offences of bribery, corruption, extortion or abuse of office;

2 The officials of National Drug Law Enforcement Agency; and this is limited to proceeds of illegal dealing in narcotic drugs; and

3 The court's inherent jurisdiction to ensure that a party to an action does not slyly deplete his account pending the outcome of litigation. And that is only after obtaining evidence and hearing the party concerned.

Sometimes the bank customer's trouble is not with the institution but with bank employees. Statistics show that majority of **bank frauds where customers are ripped off their hard earned income are by less-than-noble bank employees**. Section 19 of the Banks and Other Financial Institutions Act 1991 provides that banks should employ only persons of character. In my article on this section, I advocated that the provision is designed to protect, not only the bank, but the customer. I urged that a customer who loses money as a result of the fraud of a bank employee should be able to recover from the bank where the bank fails to prove that it took steps to verify the person's character before employing him; or that he was kept in employment after his character has been impugned.

Yet another area of my research on banking law is **the law's treatment of depositors where a bank fails**. Some of us would recall that in January 1998 the Governor of Central Bank announced the revocation of the licence of 26 banks for their failure to meet depositors' demands for their money. Upon such eventuality, the Nigerian Deposit Insurance Corporation (NDIC) becomes the receiver of such bank. It has the duty to, among other things, pay depositors. Section 25 of the NDIC Act provides that depositors are entitled to a maximum of N50,000. It is immaterial how much a depositor has in his account. In my article which was published two months after the announcement, I recommended the English Banking Act 1979 model which provides for graduated payment: 75% for the first £10,000, etc. Secondly, NDIC is obligated to pay any taxes, unpaid wages, social security deductions under the Nigerian Social Insurance Trust Fund, and claims under the Workmen's Compensation Act which the bank owes before depositors may be paid. In my article, I recommended that after the payment of the cost of liquidation, depositors should be the next on the hierarchy because a bank's assets are essentially the fruit of depositors' toil. It is irrational and unconscionable for the law to regard such moneys as the bank's.

EMPLOYER AND EMPLOYEE

Mr Vice Chancellor, Sir, please permit me to preface this section by noting that employment law rests on a good understanding of the law of contract. At the roots of contract law is the idea that parties to a contract bargain freely, without undue influence or duress. Much of the law of contract as now applied in the English speaking world was formulated by judges in the 19th century. The judges were evidently influenced by Charles Darwin's theory that in all spheres of life the strong should eliminate the weak in order to survive (*Of the Origins of Species* 1859); by Adam Smith's *Wealth of Nations* (1776) which expounded the precept that wealth and commerce are the products of free competition actuated by motives of selfishness; and by Legendre, a French merchant who espoused the concept of *laissez faire* (government should not interfere in commerce).

Adam Smith's gospel of individualism and Darwin's survival of the fittest begot large trading corporations; these corporations begot mass production; mass production begot standard form contracts. In place of dickering and bargaining of terms of contract to arrive at consensus, what we have are standard form contracts which are bye-laws imposed by one party on others. Standard form contracts begot exemption clauses. An exemption clause either completely exempts a party's liability under the contract or circumscribes the sanction to which the party would be liable upon breach.

Shortly after World War II, parliament and judges in England began to appreciate that State intervention in private agreements was needful. Many students of history know that World War II was aimed at stemming Hitler's determination to wipe out what he considered undesirables from the earth. It dawned on all enlightened persons that at every sphere of life, the weak needs protection from the abrasion of the strong. Slowly but steadily the courts fashioned such concepts as good faith, fair dealing, reasonableness, social justice, and noble exercise of discretion to attenuate the erstwhile concept of *laissez faire.* Responsive parliaments responded with such statutes as Unfair Contract Terms Act 1977 (England), Consumer Protection Act 1978 (Quebec, Canada) and section 205 of US Second Restatement

of the Law of Contract. Pithily, these and many other statutes impose a duty on contracting parties to deal with one another in good faith and fairly; and where any fails, the court can nullify the contract. Sadly, no Nigerian parliament has responded in this manner.

Applying this to Nigerian employment law, we all know that employers simply impose terms on employees without their consent. The courts have failed to rise to the protection of employees. In my book *Employment Law* (2004) I urge that courts can take advantage of constitutional provisions to attenuate harsh contract terms employers impose. I reminded persons in authority of what Shridath Ramphal, former Commonwealth Secretary-General, calls `otherness.' This concept is the attitude of persons who enjoy temporary advantage to perceive someone else as the other. The lessons of history are clear that each and every member of the society is in time a victim of the harsh mistreatment he metes out to others. There is the story of Pastor Niemoeller who lived in Nazi Germany. He failed to speak out when the SS (Hitler's elite guard) went for the Jews, the communists, the trade unionists and finally the *Ernste Bibelforchers* (Earnest Bible Students as Jehovah's Witnesses were then known in Germany) because he was not one of them. Then ultimately the SS went for him; and there was no one left to speak for him.

What is the lesson here? Most of the oppressive and repressive rules against employees are fashioned by persons in authority, but no sooner do they make the rules than do they become victims. Here in University of Benin, the extant Staff Regulation stipulates that no staff may sue the University until after he has given the University at least one month notice. I was called upon to comment on certain aspects of the Regulation before it was published. I advised against this clause because I perceived it as undue clog on the right to access to court for redress, but I was overruled. Guess who the first victim was.

Mr Vice Chancellor, please permit me to outline some of my recommendations in my book on Employment Law.

1 The court should be the sole authority to decide what constitutes misconduct. This is the position in French-speaking African countries, India and England. In Nigeria, if management decides that lateness for half an hour is gross misconduct, the courts say they have no jurisdiction to interfere: ***laissez faire.***

2 Contract staff as well as staff on temporary or probationary status in civil and public services should be accorded the same protection as confirmed staff. The Supreme Court position is that such staff should be treated as employees in the private sector without any security of tenure.

3 Employees of companies where government has majority shares should be considered as public servants and accorded the security of tenure they deserve.

4 A person should not be dismissed for disobeying unreasonable orders. The old law was that as soon as the employer proves that an order is lawful the employee must obey. In 1959 the law changed in England: the Court of Appeal held that the order must be lawful, reasonable, and proper and the disobedience must strike at the relationship between the parties: *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698, 700. Sadly, Nigerian courts continue to cling to the old law.

5 Employees who engage in whistleblowing should not be terminated; indeed they should be retained in employment and commended by government. Without such protection, the noble provisions in the Workmen's Compensation Act, Factories Act etc would remain nothing but moral adjurations.

6 An employee who is incompetent in one department should be given another opportunity before he is dismissed. In Japan, no one is employed as a driver or clerk or executive officer. Employees are rotated from one assignment to another, from one department to another. With such mobility, upon retrenchment, an employee can easily fit into another establishment.

7 In lieu of disciplinary penalties (demotion, delay of promotion or dismissal) judges should impose on employers the need to consider contractual penalty (withholding salary or deduction from salary). In Nigeria, all misconduct potentially leads to disciplinary panel and from there to dismissal.

8 A moderated right to strike exists under Nigerian law. Araka CJ's construction of section 17 of the Trade Disputes Act 1976 is a must-read: *Eche v State Education Commission* [1983] 1 FNR 386. The right to strike is rooted in the right to associate and form unions. Parliament cannot give the right and

take away the only tool at the disposal of labour to achieve a balance in bargaining power. Of course, politically-motivated strikes are unlawful; also lightening strikes.

9 Section 42 of the Trade Disputes Act 1976 states that a person who proceeds on strike forfeits his right to wages during the period of strike, and any such period shall not count for the purpose of reckoning the period of continuous employment. We do not dispute this provision; what we object to is the practice of dismissing or terminating employees who proceed on strike. Since the Act does not empower an employer to dismiss employees who proceed on strike, it is submitted that having exhausted the sanctions an employer may recourse to, the Act has taken away the right of dismissal consequent upon a strike which the common law gives employers.

10 The courts should apply the clear provisions in section 9(6)(a)(b)(i)(ii) of the Labour Act which provides that no employer shall dismiss an employee by reason of trade union membership or activities. Sadly, Nigerian courts have never referred to this provision even though trade union officials are dismissed daily. In French-speaking African countries the law bars management from dismissing any trade union official or any employee who expresses desire to contest union office or any official who has vacated office unless he is guilty of gross misconduct. The official may only be suspended while the court assesses the misconduct to confirm if it is sufficiently gross to ground dismissal.

11 Perhaps the most objectionable aspect of Nigerian employment law is that the courts are unwilling to question the motive behind a termination of employment. This is judge-made law and there is no need for parliamentary intervention to unmake it. Nigerian judges are urged to take a cue from their Japanese counterparts. The Japanese Civil Code empowers management to terminate an employee with a 30-day notice without more. But the courts formulated a protective wall around employees by stating that abusive exercise of a right will not be countenanced. Japanese judges, realizing that the country's chief natural wealth is its labour, strike down all terminations that are unreasonable and socially inappropriate. It is for the employer to prove the grounds for terminating an employee, not the employee's to prove that his termination is unlawful.

12 I called for the putting of meaning into the meaninglessness in section 20 of the Labour Act on redundancy. The Act provides that after informing union, management should apply the last-in-first-out (LIFO) principle in declaring a person redundant. The Act does not say what would be the penalty if management fails to inform union. And with regard to redundancy payment, the Act empowers the Minister of Labour to make rules on that. To date no Minister has made any rule to that effect. In French-speaking Africa and in the European Union, the principle of social selection is adopted, not LIFO. Single employees are declared redundant ahead of those who are married; and an employee with children is retained ahead of a married but childless employee. Parliament here appreciates that loss of employment affects more than just the employee, that it has far-reaching effects on the family and the larger society. With regard to redundancy payment, in lieu of the stepmotherly style of the Labour Act, I advocated the English model which has a scale based on the age of affected employees. Who will doubt the fact that the aged find it more difficult to adapt their skills to a changing labour market, and that it is often more difficult for them to obtain new jobs.

13 With reference to employees on probation, I advocate that the maximum probationary period should be six months, not six years as we find in some establishments in Nigeria. Six months is the maximum in French-speaking African countries. Further, as soon as the probationary period effluxes the employee should be deemed to be confirmed whether or not he is written a letter of confirmation.

14 My suggestion that an employee should be entitled to his pension and gratuity whether or not his service is meritorious is considered in some quarters as the most earth-shaking. If a person is entitled to pension after ten years of service and after attaining 45, why should he lose his pension and gratuity merely because in the 11th year he commits an act of gross misconduct? Neither the Pension Act 1979 nor the Pension Act 2004 says so. What the judges have done is to apply the principle in Ezekiel chapter 3 in the Holy Bible where God states that if a righteous person becomes wicked his righteous acts would be wiped out. This is an objectionable application of the principle because the same Holy Writ says that if a wicked person turns back and practices righteousness his wicked acts would be forgiven and forgotten.

What opportunity does an employee who is guilty of misconduct have to right his wrong after dismissal? I advocate the application of the principle formulated in Indian courts where it has been held that even where an employee is guilty of financial impropriety, or misconduct which results in financial loss to the employer, the employer should deduct the amount from the employee's entitlement and pay him his due. While I am all for combating corruption, I suggest that the solutions we adopt must be consistent with the promotion of the welfarist values which are reflected in the Constitution.

THE MORTGAGEE AS HORSE; THE MORTGAGOR AS ASS

A mortgage arises where a person transfers his property (here I limit myself to land or house) to a lender to secure a loan. The borrower who mortgages his land is a mortgagor; the lender is mortgagee. Maybe it is unnecessary to state that the borrower is the weaker of the two contracting parties and without the protection of the law the lender can take undue advantage of his superior bargaining position. That is exactly what has happened over the centuries. In Nigeria clever (I am almost tempted to say dubious) lenders have attempted to rip borrowers of one of the chief remedies the court affords them. This is the equitable right to redeem at any time, even half a hundred years after the loan was granted. This is the borrower's right to recover his land from the lender upon payment of the principal and interest. The mantra is `once a mortgage always a mortgage.'

With the rise in southern Nigeria of parents' quest to send their children abroad, many have borrowed money on the security of their land. The document is couched as a conditional sale, stipulating that if the seller (the borrower) fails to pay the money within one year (or six months) the conditional sale would become absolute. Through this subterfuge, the landowner loses the right to redeem at any time after one year, contrary to the principle `once a mortgage always a mortgage.'

In my book, *Law of Securities for Bank Advances (Mortgage of Land)* 2001 (now in 2nd edition 2004) I urged the courts to look behind the written document and ascertain if the seller is a wretch, if the buyer is in money lending business, and if a lawyer represented the landowner in the course of the transaction. If the seller is desperately poor, the court should exercise extra care in construing the transaction as a sale; if the buyer is not a moneylender the court should be hesitant to regard the transaction as a sale; and if the buyer hired the lawyer who prepared the document, the court should hold the transaction a mortgage.

Second, I am the only writer who has effectively drawn a line between consumer mortgage and commercial mortgage. My thesis is that if the mortgage is commercial, the courts should not unduly interfere since almost always both parties would hire lawyers who should protect their respective interests. Whereas in consumer mortgages there is an acute need to protect the borrower. Although in many jurisdictions (e.g. Consumer Credits Act 1974 England) judges are empowered by parliament to reopen agreements that contain unfair terms, in my book I urge that an activist forward looking judge can protect a consumer mortgagor based on the court's inherent power as an umpire to ensure that a heavyweight champ does not inebriate a lightweight with punches.

In a mortgage, the mortgagor transfers the land to the lender; in theory the lender becomes the new owner. But I have urged that when things get crunchy the mortgagor should sell the mortgaged land because it is more viable for him. Such sale is not fraudulent as some of my colleagues would say; rather, what the mortgagor sells is his equity of redemption. The buyer steps into the shoes of the mortgagor, pays off the mortgagee and obtains an unencumbered title. If the mortgagee is permitted to sell the property, almost always he sells at undervalue to the detriment of the mortgagor.

LANDLORD AND TENANT

Without exaggeration, my greatest contribution to knowledge is found in my works on the law of landlord and tenant. The casebook hit the bookshelves in 1990; I edited it in 2006 a few months after my tenure as Dean of Law. The text on it was published in 1994. I have over ten articles on the subject. With the aid of decisions from England, Ireland, Australia, US, and of course, Nigeria, I illumined the way in the following areas of the law, among others.

1 The death of a landlord or tenant does not determine a tenancy. Upon the death of a tenant whoever remains in possession becomes the new tenant; if the landlord wishes to terminate the tenancy, he must serve whoever is in occupation due statutory notices and he can recover possession only after obtaining an order of court. I have urged that upon the death of a landlord, tenants should not hastily pay rent to the first person who comes for it. Once a tenant pays rent to say, a widow or a first son, he would be estopped from denying the title of the person he had paid rent to. Rather than pay rent to anyone, he should keep it. If anyone disturbs him, he should take out an interpleader summons by which the claimant would appear before the High Court to prove his right to the rent.

2 Where premises are used for residence, the landlord has no authority to increase rent whimsically. He may only increase rent with the authority of a rent court (in most States this is either a Magistrate's Court or a Customary Court).

3 Courts are urged to look beyond the agreement between a landowner and a person who hires it for use. Since many landlords realize that the law protects tenants, they couch the agreement as a licence with a view to robbing land hirers the protection the law affords them. Judges should be on the qui vive to ensure clever draftsmen do not pull the wool over their eyes.

4 The common law is that an employee who occupies premises that belongs to his employer may either be a service occupant (licensee) or service tenant (tenant). A service occupant has no protection under the law; he can be kicked out the same day he loses his job thereby rendering him jobless and roofless the same day. Professor Sagay and Dr Iyayi were victims of the application of this rule on this campus less than two decades ago. I have argued that this common law rule is too harsh for our milieu especially since employees have no job security. All employees should be considered tenants and no employee should be rendered roofless until a court order is obtained against him.

5 The English common law rule of *caveat lessee* (let the tenant beware) makes it possible for a landlord to let a ramshackle to a tenant. There is no obligation on the part of a landlord to provide kitchen, bathroom, toilet, even roof. Whatever a tenant chooses to take becomes his home. I have advocated the abandonment of this rule for the US model which was fashioned by the courts. Judge Wright of the US Court of Appeals did not wait for parliament before he posited: "When American city dwellers, both rich and poor, seek shelter today, they seek a well known package of goods and services – a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance:" *Javins v First National Realty Corp* (1970).

6 Where a landlord fails to effect repairs which is his duty to effect, a tenant has a duty to inform him to do so. Where the landlord fails after a reasonable time, the tenant may effect the repair and set-off the cost against rent.

7 If you are a tenant, you may have encountered a landlord who refuses to accept keys from you on the ground that you have not effected repairs he expects of you. As long as you keep the keys, he insists on collecting rent from you as tenant even after you have moved out from the premises. I recommend that such a tenant should make a report in a Police Station, send the key by registered courier and await the worst. If the tenant can afford it, he may hire the services of a lawyer who should write the landlord, informing him that he may collect his key from him (the lawyer) or from a court that has jurisdiction to decide landlord and tenant disputes.

8 Landlords are known to swear to an affidavit stating that a tenant has abandoned the premises for months or years and the court should give them authority to break open the premises, store the tenant's goods in a safe place, and retake possession. Almost always courts with jurisdiction to decide landlord and tenant disputes grant this application. I have brought the attention of the profession to the Supreme Court decision that condemns this procedure:

Ihenacho v Uzochukwu [1997] 2 NWLR (pt 487) 257. Before this decision I had, in 1994, outlined the procedure a landlord should adopt where a tenant genuinely abandons possession. The use of affidavit is fraught with dangers of abuse and should be stopped forthwith.

THE HORSE AND ASS IN RELIGION

Mr Vice Chancellor, Sir, please permit me to state in a summary the outcome of my research on the impact of the law on a common feature of most religious groups nowadays. One is **schism** – the division of a group of united body of religious devotees into opposing sects. The outcome is religion without spirituality as President Obasanjo chooses to call it, or churches without religion as an Irish judge describes it. The judge's words are two centuries old but they remain fresh; he described some churches as:

> A mere incongruous heap of, as it were, grains of sand, thrown together without being united, each of these intellectual and isolated grains differing from every other, and the whole forming a but nominally united while really unconnected mass; fraught with nothing but internal dissimilitude, and mutual and reciprocal contradiction and dissension…. This indeed I should hold to be … a Church without a religion: *per* Baron Smith in *Dill v Watson* (1836) quoted in *Free Church of Scotland v Overtoun* [1904] AC 515, 616.

When a church is formed usually it acquires assets through donations from members and non-members. Where some secede the courts disassociate themselves completely from matters of doctrine; they concern themselves only with issues that bear on legal rights. The law considers that a church's funds and assets are donated in furtherance of the doctrines as at the time the donations are made. Where there is schism the court's sole duty is to ascertain what the original purpose for which the funds in dispute were collected, what the original trust is. The courts reason that it would be utterly irresponsible and presumptuous for the trustees for the time being – whether or not they are in the majority – to deviate from the original purpose and use even a minute part of the assets for a purpose other than the original.

My research assessed Nigerian courts' application of these principles; I awarded them a pass mark as they showed keen acuity in disassociating themselves from matters of doctrine. In my conclusion I stated:

> Decisions from Nigerian courts show that among other things, leadership tussles, the folly of mixing politics with an emotive issue such as religion, absence of sincere spirituality, sectionalism, as well as doctrinal issues have been at the roots of clerics washing their soiled garbs and gowns in the spotlight of our courts. As well, caught in the vortex of insatiable greed for power and giving free rein to the whiff of money, clerics are blinded to scriptural principles and this goads them to court.

Flowing from schism is the issue of **registration of churches.** At the present, there are two large Christian groups scrambling to control the soul of organized churches. First is Christian Association of Nigeria (CAN), later Pentecostal Fellowship of Nigeria (PFN) was formed. There is no love lost between these associations. For instance, Dr Anthony Olubunmi Okogie as Catholic Archbishop of Lagos, was reported to have said that persons who are involved in cocaine and drug-related businesses fund the new generation churches that proliferate everywhere: *The Guardian on Sunday,* April 10, 1994, p 28. In contrast, Mr G A Eni laments that clergymen in orthodox churches scramble for rich parishes, appointments to church national staff positions and board of directors as well as engage in intrigues, ethnicism and geocentricism: *The Perversion of Christianity,* Benin City, New Era, 1994.

Of importance to me in the research is that CAN seeks to be given the sole authority to register churches. Thankfully, Corporate Affairs Commission has stoutly resisted this move. My position is that registration or incorporation is not a condition precedent for forming a church. Section 38 of the 1999 Constitution is clear: Every person is entitled to freedom of religion including the freedom to propagate and manifest his religion in practice and observance. Also relevant is section 40 which gives every person freedom to assemble and associate. These provisions are subject to enactments of the National Assembly or a State Law that may circumscribe these rights. At the present, no enactment insists on registration

prior to assembling for worship. We pray fervently that such fascist law will never see the light of day in Nigeria. If a religious group wishes to register its name for the purpose of purchasing property, entering into a contract, etc, then it needs *incorporation* like a company under the Companies and Allied Matters Act.

Even as we speak, some mainstream religious groups make life unbearable for smaller religious groups, branding them as cults and frauds. All peace loving persons must join hands to stem this institutional oppression of the ass by the horse because religion is an emotive matter. Where equipoise is not applied in dealing with it, the society often gets consumed in the conflagration that follows.

CONCLUSION

My conclusion, Mr Vice Chancellor, shall take the form of recommendations for the sustenance of law, justice and order in this country and in all other jurisdictions.

1 Legal practitioners should keep in mind the nobility associated with their profession and calling. In whatever sphere of legal practice we find ourselves we should put civility, sincerity and truth ahead of selfish tendencies. This way we earn the society's respect and trust.

2 Notwithstanding the shortcomings of legal practitioners, all should learn to respect and consult them. The task of analyzing a difficult situation and presenting solutions with clarity calls for a specialized training and for a type of mind only legal practitioners possess.

3 Everyone must learn to obey court orders. It appears we are approaching the point where individuals choose which order to obey and which to jettison; if I am correct then we are at the door of the anarchy that will precede Armageddon!

4 The National Judicial Commission should please continue to appoint the most capable persons to the bench. Sometimes the quality of judgments boggles the mind. The respect that is due the judiciary will wane swiftly when a sincere and dispassionate lawyer is unable to explain to a layman the law, logic and reason why he lost his case. Next time he would find it difficult to obey the law; nay he may lose his trust in the judicial system. That will be a step away from resorting to violence to settle disputes.

5 Judges should learn to be activist, not bogged down by the doctrine of precedent, especially in the area of private, property and commercial law. The Nigerian experience is that civilian parliaments have been lethargic in making laws relating to property and commercial law. Most of the post-independence laws in these areas of the law were enacted during the military era. In order to ensure that the law does not lag far behind the expectations of commercial men, judges should jump over the chain of judgments of yesteryears and be forward-looking as businessmen and the worldly wise are.

6 All in authority who must play the horse over the ass should learn to observe canons of decency and fairness. In all spheres of life all must learn to displace the rule of personal discretion and despotic power as well as indistinct, ill-understood and fluctuating customs: the rule of law must reign supreme. And in enforcing the law we all should keep in mind that we live in a world of social administration not a legal battlefield, a world where persons should be more important than procedures, and kindness more important than efficiency.

A FINAL WORD

I love watching football and I wish to end by saying that sometimes I philosophically compare life to a football match. Some footballers obtain a red card, some a yellow, some get injured or die on the pitch, many fail to win any notable medal, some win a bronze, a few must make do with a silver, an insignificant few ever win a trophy and get a gold medal hung on their neck. I believe earning a professorial chair in law is as good as obtaining a gold medal. For this, I thank the only true God, Jehovah, for his loyal love towards me. My sentiments are expressed by the unnamed composer of Psalm 113:6-8:

> Jehovah is condescending to look on heaven and earth, raising up the lowly one from the very dust; he exalts the poor one from the ashpit itself, to make him sit with nobles.

My prayer is that he endows me with a humble spirit so that nothing I do as a professor of law will deprive me of the chief prize he has set before all mankind as Jesus states in Matthew 11:12:

> The kingdom of the heavens is the goal toward which men press, and those pressing forward are seizing it.

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